Informed Opinion

Contingent Fees in Medical Malpractice Litigation — A Qualitative Assessment

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The medical profession has experienced high liability insurance premiums accompanied by widespread use of contingent fees in medical malpractice litigation. It is worthwhile, therefore, to assess qualitatively the merits of contingent fees, the evidence suggesting that they are associated with unjustified litigation and their implications for the medical and legal professions.

For the medical profession there have been steadily rising liability insurance premiums whose rate of increase is above that for general economic inflation.[1] Data are still being gathered on the precise impact of rising premiums on medical cost, quality and accessibility.[2,3] Nonetheless, little discussion has centered on *why* liability premium rates have risen so dramatically other than to note that claims are rising (in number and dollar amount) while insurers attempt to cover their higher risk. Meanwhile, the medical care field has adapted to the changes in professional liability through a variety of different mechanisms—paying higher premiums, practicing defensive medicine (that is, using good medical practices to reduce liability exposure), canceling insurance, self-insuring and forming cooperative insurance groups.[4,5]

Beyond the rising health cost implications of contingent fees there is an unsettling belief (among physicians) that this mechanism serves as a stimulus to promote an increased number of unjustified suits, often of nuisance value and of such a nature as to wrongfully tarnish the reputation of the defendant physicians. The objectives of this paper are to qualitatively assess the merits of contingent fees in medical malpractice litigation and to explore whether physicians are oversensitive to litigation. As the medical care field continues to address the professional liability problem, two basic health policy questions must also be addressed: What factors have supported medical malpractice litigation? What attitude should physicians adopt toward the malpractice issue?

The Concept and History of Contingent Fees

In his book *Contingent Fees for Legal Services,* published by the American Bar Association, F. B. MacKinnon defined a contingent fee as follows:

> a fee received for services performed on behalf of a client who is asserting a claim, payable to the lawyer if, and only if, some recovery is achieved through the lawyer's efforts. Its distinguishing characteristic is the negative; if no recovery is obtained for his client, the lawyer is not entitled to a fee.[6(p8)]

This legal financing method is not limited to malpractice litigation. It is widely used in American legal practice in personal injury cases of which medical malpractice is only one category.

Contingent fees typically are structured as a percentage of the final financial product of the litigation. In medical malpractice cases, this percentage has varied from 10% to 50% of the award to a plaintiff.[7] As well, they are often defined as a decreasing percentage of the recovery (for example, 40% of the first $5,000, 35% of the next $20,000 and so forth). The fee payable to an attorney is usually in addition to actual expenses incurred in managing the case. Expenses are charges billed to the plaintiff's lawyer by consultants or other lawyers, as well as out-of-pocket expenses incurred by the plaintiff's lawyer (travel expenses, for instance). Some states such as Michigan and New Jersey have established maximum contingency fee schedules allowable within the state.[7] These schedules may limit the contingent fee charged by a plaintiff's attorney, and in addition, contingent fee contracts are subject to supervision by the courts.

In contrast to contingent fees, the fee-for-service method is the conventional system of payment for legal

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services. This is similar to the fee-for-service approach used frequently in other professions, including medicine. The fee-for-service method promotes the notion that the professional "sells . . . expert advice, generally on confidential matters, where probity is essential."[8] The elements of value offered by the professional in the exchange are time, knowledge, experience and skill in utilizing those assets. The problem of quantifying these services for client pricing purposes has traditionally been solved by dividing the services into units of time or specific procedures. For example, an appendectomy by a surgeon, an office call by an internist or the preparation of a will by an attorney all illustrate the fee-for-service methodology. The majority of legal services in the United States are priced by this method, although there is widespread use of contingent fees in personal injury litigation.[9(pp193-194)]

A complete understanding of the contingent fees depends on recognizing the distinction between *champerty* and *maintenance*. Champerty is an ancient common law crime consisting of a bargain made by a person who is not a party to the suit to bear expenses of litigation in return for a share of whatever is gained in the suit. In contrast, maintenance is the officious intermeddling in a legal suit, by financially supporting the prosecution of the suit. This, too, is a common law crime. The accepted current distinction between champerty and maintenance is that maintenance refers to the financial support of a party to a lawsuit by one who has no direct interest in it, while champerty is the agreement to carry on a lawsuit in exchange for the promise of a share in the recovery. Thus, to the extent that the client's success is shared with his or her attorney there is a similarity between champerty and contingent fees.[6(pp37-38)]

The contingent fee mechanism as a system of payment for legal service is principally confined to the United States. It is illegal and unethical in the practice of law in England, France, Germany, a number of other European countries and India.[10] However, the practice is accepted in Japan, Spain and some provinces of Canada. The attitude of the American Bar Association toward it has gradually changed during the 20th century.[11] The implications of this acceptance for the medical field and individual physicians are best understood by reviewing the justification for its use.

Justification for Contingent Fee Use

Probably the most widespread and most forcefully argued justification in support of contingent fees is their social merit. They provide a mechanism for promoting the cause of justice on behalf of persons in society who could not otherwise afford legal services. It is argued that "no other system has been suggested which provides capable legal service to those unable to afford legal fees, without introducing serious risks of destroying the (legal) profession."[12] Because of the support it provides the economically indigent, the mechanism gained widespread application in the United States. It is now the major system for financing personal injury litigation. Contingent fees are also justified because of their positive motivating influence on attorneys. It may motivate attorneys to work more effectively and conscientiously on behalf of their clients by placing gross earnings at risk. The fee is dependent on the size of a client's recovery. Similar to the production worker paid on a piece rate, the greater a lawyer's output, the higher is the reward. There is a more subtle significance to this argument than mere prodding to work harder and to pursue more substantial outcomes. Unlike a factory manager who hires a piece rate worker, the legal client is not qualified to evaluate the quality of the lawyer's performance during the process of litigation. Clients inevitably develop the perception that the lawyer is performing at maximum capability because of the motivating effect of the incentive.

Contingent fees encourage skilled speculative work in many areas of legal practice that would otherwise go without attention. This has important social significance in promoting unpopular or minority causes, the resolution of which may prove to the ultimate good of society. Additionally, they can promote expeditious and cost-effective litigation. In the pursuit of a medical malpractice action using a contingent fee, every hour expended by a plaintiff's attorney represents an additional investment of resources in the case. The result may be a proportionate decrease in marginal earnings from the litigation if earnings equal a percentage of the recovery minus the time invested in the case. Therefore, it may be argued that the plaintiff's attorney will seek to bring a case to its earliest possible conclusion consistent with the client's interest. This will save judicial resources, defense efforts and the commitment of time, energy and resources by all parties involved.

Contingent fees have several other characteristics that support their use. From the perspective of a plaintiff, a suit, even one with great merit, bears risk. A contingent fee allows the plaintiff to shift some of the risk in the case to the lawyer. If the suit is unsuccessful and no recovery results, the lawyer receives no fee and the client usually incurs little expense. By contrast, the plaintiff who agrees to pay a lawyer an hourly fee suffers an even greater loss (the lawyer's fee) if the suit is unsuccessful.

Another justification for contingent fees is their enabling qualities allowing lawyers to compete as entrepreneurs in a competitive society. They do so with their assets (their skills, knowledge, wisdom, experience, time and office arrangements). They place these assets at risk with expectation of financial returns. In the case of the medical field they recognize that a medical malpractice case may have economic value. If a case has little or no economic value, a lawyer will not invest his or her assets in pursuing it. Under the right conditions (that is, a just court verdict) the outcomes are good for the lawyer, good for the client and good for society.[13]

Criticisms of Contingent Fees

Although contingent fees possess a number of redeeming values that support their use, they also have

a number of negative aspects. They introduce an element of risk into the attorney-client relationship. Under the contingent fee arrangement the attorney is involved in the case, anxiously looking toward the size of the settlement. To pursue this issue, it is necessary to examine the professional obligations of an attorney. Attorneys, like physicians, are members of a privileged, monopolistic, licensed elite. They owe a responsibility not only to themselves as entrepreneurs and to clients as consumers of legal services, but to the courts as well. There is an evident potential conflict of interest.

A review of the history of the attitudes of the legal profession towards the propriety of contingent fees and the potential conflict of interest they may stimulate, indicates that the legal profession does not totally agree about the concept. The dictates of English common law about champerty and maintenance were previously noted. There is a detectable schism in the American Bar Association's *Canons of Professional Ethics* in this regard.[9(pp394-397)] Canon ten states, "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting." Canon 12 describes a method acceptable for "fixing the amount to the fee." That method describes the usual professional fee for service based on needed time, skill, availability of lawyers, customary charges, risks and relationship to the client. Canon 13 is captioned "Contingent Fees." It reads as follows:

> A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risks and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.

Canon 13 was adopted by the American Bar Association in 1908 and amended to read as reported above in 1933. The concern of the organized bar is evident in the original draft of the proposed canon in 1908, which read, "contingent fees may be contracted for, but they lead to abuses and should be under the supervision of the court."[14] Finally, Canon 13 of the Boston Bar Association reflects much the same kind of reservation:

> A lawyer should not undertake the conduct of litigation on terms which make his right to reasonable compensation contingent on his success, except when the client has a meritorious cause of action but no sufficient means to employ counsel unless he prevails . . .[15(p88)]

Thus, a major argument against contingent fees is that an attorney's stake in the outcome of a case introduces an attitude toward the practice of law inconsistent with the detachment essential to the profession. It has been said that such an attitude may lead to "improper coaching of witnesses" and "groundless legal arguments designed to lead the court into error."[15(p33)] There may result an emphasis on winning that impairs the lawyer's self-restraint in negotiation and advocacy, thereby endangering the effective operation of the judicial system. This overemphasis on winning may, however, also be present with fee-for-service compensation arrangements; lawyers do not aim to lose.

Another criticism suggests that the use of contingent fees results in potential rewards of such enormous size as to encourage competitive solicitation of clients. Additionally, their use may increase the number of suits having little merit but substantial nuisance value. Ethically, of course, there are constraints on the pursuit of such cases. There is a well-defined concern in the legal system over the stirring-up of litigation. It is formally expressed in public policy and in English common law as the act of *baratry*—a crime.[16] It is interesting to note that concern about contingent fees has led to their repudiation in different legal circumstances such as divorce or payment for securing legislation or favorable administrative rulings.

There are a variety of potential divergences of interest between a plaintiff and his attorney when a contingent fee contract is used. Once the contract is drawn and the associated time and effort invested by the lawyer, the lawyer has an increasing investment in the case. Questions of who makes the decision of when to settle and for how much assume greater significance. Although the client theoretically has control over these decisions, as a practical matter the attorney usually addresses such matters—the attorney's recommendations are frequently pivotal. This is probably as it should be given the lawyer's superior knowledge of the case. With a contingent fee, however, the lawyer may become something of a managing partner. The attorney's interest in the case can impair the ability of the client to discipline or discharge the lawyer.

Moreover, contrary to the conventional wisdom, contingent fees do not assure indigents a day in court. Unless the prospects look profitable for an attorney, a client may be denied legal assistance if the contingent fee system is the only option for financing the services. The lawyer may well decline the risk of the case with low expected value, but this can be true whether or not the contingent fee approach is available. In a malpractice case or any personal injury litigation, there are two matters: liability and damages. The attorney assesses the likelihood of success on liability and the apparent damages amount, and creates an equation for deciding whether the case is worth pursuing. An attorney, if offered an hourly fee-for-service in a personal injury litigation, would have to make the same analysis in counseling the client on whether the litigation should be pursued.

If contingent fees progressively decline as a percentage of the recovery further conflict between lawyer and client is possible. Does the possible additional recovery for a client require a disproportionate amount of additional effort that is not marginally beneficial for the lawyer? Also because such a fee is payable without regard to time spent on the case by a lawyer, it may be to the lawyer's advantage (however unethical) to settle it quickly and on terms that are not in the best interests of the client. For example, if added work on the case would gross three times the cost necessary to obtain the result, the lawyer may have no financial incentive to pursue the claim further when the contingent fee is one third. In many contingent fee contracts, the fee is

graduated upward based on the stage of the proceedings at which a recovery is made (for example, 33% before trial and 40% after commencement of trial). Under these conditions, there may be a motivation to prolong the process.

Some have argued that contingent fees tend to increase clients' cost of personal injury litigation. A 1973 publication, the *Report of the Secretary's Commission on Malpractice* (Department of Health, Education, and Welfare) indicated that plaintiffs' attorneys who used contingent fees were paid at an average hourly fee of $63, while defense attorneys billing on an hourly basis were paid an average hourly fee of $50—win or lose.[17] That represents a 26% higher cost to prosecute a medical malpractice case using a contingent fee than to defend the same case using the fee-for-service method. The HEW report did not suggest that the difference was unconscionable, although the difference was labeled significant. The fee difference is rationalized as compensation for added risk (risk of loss resulting from failure to recover in a number of cases). MacKinnon noted that

> From the point of view of the individual lawyer, it appears that to earn a reasonably high income, he must not only charge a contingent fee, which takes account of the risk of no recovery at trial, but must also handle a good proportion of moderate sized claims which are settled at an early stage of the proceeding when the risk is small.[6(p182)]

MacKinnon's formula for lawyer success poses perils for clients in the following ways. First, the client will pay a higher price to compensate the attorney for risk and debt service. Second, the client's case may not be important enough to vigorously pursue because of cash flow considerations.

A noteworthy characteristic of the contingent fee system is its pervasiveness in certain categories of cases. It is common for plaintiffs' lawyers to favor this fee arrangement and, as previously noted, virtually all personal injury cases, including medical malpractice cases, are financed with it. Why do lawyers tend to favor contingent fees? One explanation is their profitability to lawyers. By contrast, where the use of contingent fees is closely supervised and regulated by courts and statutes—as is the case with worker's compensation proceedings in most states—there is sometimes a problem in finding a lawyer to represent a client.[7]

With these problems the question must be raised about alternatives to the contingent fee system. The Constitution guarantees the right of every person to a court appearance including representation by counsel in most criminal cases. A justification for use of contingent fees is the extension of that availability to cases in civil matters involving personal injury. Unfortunately, as we have seen, even this payment mechanism cannot guarantee that availability.

Alternatives to Contingent Fees

What alternatives are there to contingent fees? The real obstacle for the economically indigent is access to sufficient capital for financing a law suit. Canon 13 of the American Bar Association's Code of Ethics seems to support the conclusion that clients who can afford to obtain legal representation on a fee-for-service basis should do so.[15(p13)]

The goal of personal injury litigation as illustrated by medical malpractice suits is compensation for injuries attributable to substandard diagnosis or treatment. A frequent theory of the complaint is negligence by the health care provider. The objective of the legal action is not punishment but compensation for injury. There are parallels in other areas of personal injury in which the issue has been moved from the judicial to the administrative arena. Worker's compensation in many states is an example of this transition. The objective of worker's compensation is to build into the employer-employee relationship a means of compensation for work-related injury on a no-fault basis. In effect, worker's compensation builds the cost of work-related injury into the price of producing the good or service. It defines a procedure for evaluation of the degree of injury. It defines a process by which the claim can then be settled without resort to the judicial adversary process. Fault is not a primary issue. The injured party is assured that the case can be adequately pursued regardless of financial status. All parties have access to the judicial process if dissatisfied with administrative results.

Medical adversity insurance is a form of no-fault insurance which has been proposed to protect all health care consumers against the unfortunate events that can occur in any medical encounter.[18] It is proposed as a low-cost form of insurance that would indemnify a health care consumer against the cost of injury arising out of the medical diagnostic and therapeutic process. If fully implemented, it would obviate contingent fees in medical malpractice litigation because the injured patient would have no immediate need for legal assistance. Any claim would be processed as an insurance claim. From the standpoint of an injured person, the problem is simpler because only injury or harm need be shown. Negligence on the part of the health care provider is not a requirement for compensation. The objective of compensation for the injured would be served by this system. There are, however, problems with medical adversity insurance. Not all adverse events are covered so there could be many situations in which traditional liability cases would be brought. Also there are very serious difficulties in determining whether the harm suffered is a result of the case or is a continuation of the disease process or injury that brought about the need for medical care in the first place. These issues are fertile grounds for litigation.

Another alternative to contingent fee arrangements in the United States has been considered by the Royal Commission on Legal Service in Great Britain. An objective of the Commission is to eliminate financial barriers to the pursuit of a suit for personal injury. The Commission proposed the establishment of a "contingent legal aid fund."[16] It would be designed specifically

to do away with the deficiencies of the American system of contingent fees. As an agency, it would be interposed between the client and the lawyer, leaving the former free to exercise independent judgment. Once a claim had been entered, it would be submitted to a committee of lawyers charged with determining whether grounds exist for the case. The plaintiff would then be free to select a lawyer. The contingent legal aid fund would then pay the plaintiff's lawyer on a fee-for-service basis regardless of the outcome. Upon success, the plaintiff would be required to pay over to the fund the predetermined contingent fee. It has been estimated that the contingent legal aid fund would initially require government capitalization, but that it would be self-sustaining within five years. The principal merit credited to this proposal is elimination of the cost barrier to the plaintiff, while remaining free of the champertous-like relationship that may result from the contingent fee contract between lawyer and client.

Implications for Physician Attitudes

Physicians may be overly sensitive to the impact of malpractice litigation. As a group, they would probably admit that contingent fees help clients pursue a claim with minimal financial risk to the clients. Physicians who are aware of the mechanics of this fee mechanism would also admit that it permits indigent persons a better access to legal services. In reality because malpractice claims have high potential for producing income, "legal aid" programs must typically refer these cases to the private bar. Today many of the publicly supported legal assistance programs are on precarious financial ground and may not be able to afford the luxury of passing up the kinds of fee generating cases they have traditionally. However, it is clear that contingent fees have had the effect of making legal services more generally available by (1) freeing "legal aid" resources from malpractice cases so that they can be directed toward non-fee generating cases and (2) making the fee generating malpractice cases of clients otherwise unable to afford legal services attractive to members of the private bar. Thus it is clear that the existence of contingent fees results in more litigation than would occur under an exclusively fee-for-service system. Physicians are, understandably, not pleased.

Physicians should also recognize that the contingent fee system is a practical approach to financing legal services for many who are injured. Nonetheless, there are important defects in the system that raise serious questions about its continuous use in financing medical malpractice litigation. However, simply eliminating it is not the answer. The economically indigent must have access to the courts. Although not assuring such access, it does provide an avenue, but other avenues need to be explored. For example, efforts might profitably center on altering contingent fee arrangements to minimize nuisance suits, or on creating new forms of arbitration outside the courts.

The preceding discussion identifies two problems. First, the contingent fees that are so widely used in American personal injury litigation possess a number of limitations that can result in legal abuse. Second, the present judicial system fails to provide all persons access to court. While not all personal injury plaintiffs are poor, the legal profession has promoted a system in which many are represented on a contingent fee basis. Physicians are encouraged to understand the factors that led to this state of affairs, and with that understanding avoid developing an unhealthy paranoia that the legal system has conspired against them.

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